IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JAIME G.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, J.G., AND J.-G.,
Appellees.

No. 2 CA-JV 2018-0091
Filed December 12, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD20160604
The Honorable Kathleen Quigley, Judge

AFFIRMED

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

Pima County Office of Children's Counsel
By Sybil Clarke, Tucson
Counsel for Minor

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

E P P I C H, Judge:

¶1 Jaime G. appeals from the juvenile court's order terminating his parental rights to J.-G., born in August 2017, on the ground that, within the preceding two years, the court had terminated his parental rights to another child, J.G., for the same reason, finding that same reason rendered him "currently unable to discharge parental responsibilities." A.R.S. § 8-533(B)(10). Jaime challenges the sufficiency of the evidence to establish that (1) the basis for the court's termination of his rights to J.G. continued to exist, (2) the Department of Child Safety (DCS) had made reasonable efforts to reunify the family, and (3) termination of his rights was in J.-G.'s best interests. In his supplemental brief, Jaime challenges the constitutionality of the severance statute based on our supreme court's recent decision in *Alma S. v. Department of Child Safety*, 245 Ariz. 146 (2018). We affirm for the reasons stated below.

Factual and Procedural Background

¶2 To terminate a parent's rights, the juvenile court must find by clear and convincing evidence at least one of the grounds for termination that are set forth in § 8-533 exists, and that a preponderance of the evidence shows severance of the parent's rights is in the child's best interests. *See Titus S. v. Dep't of Child Safety*, 244 Ariz. 365, ¶ 15 (App. 2018) (citing A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005)). On appeal, "[w]e view the evidence in the light most favorable to upholding the court's order." *Id.* "We accept the juvenile court's findings of fact if reasonable evidence and inferences support them, and will affirm a severance order unless it is clearly erroneous." *Alma S.*, 245 Ariz. 146, ¶ 18 (quoting *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 9 (2016)).

¶3 In its under-advisement order terminating the parental rights of both Jaime and J.-G.'s mother, Jessica B., the juvenile court reviewed the

history of this case as well as the dependency and severance proceedings involving J.G. The court incorporated the factual findings it had made in its June 2017 order terminating Jessica's parental rights to J.G., stating that those findings were relevant to both parents, although Jaime had relinquished his rights in May 2017 on the first day of the severance hearing. Briefly, the record shows the following.

¶4 J.G. was removed from the home after an incident of domestic violence. Jaime had threatened Jessica and another person with a gun, and was convicted of aggravated assault and placed on probation. J.G. was adjudicated dependent as to both parents after they admitted allegations in an amended dependency petition. A subsequent test of J.G.'s hair was positive for amphetamine, methamphetamine, cocaine, benzoylecgonine, and THC metabolites. Jessica was charged with drug-related offenses committed in November 2016, and she was placed on probation in August 2017 after she pled guilty to solicitation to possess a dangerous drug and possession of drug paraphernalia.

¶5 Both parents were offered a variety of reunification services, including services designed to address their substance abuse and domestic violence issues. Jessica refused services for months and did not seek treatment for her drug addiction or mental health issues. Both parents failed to comply with the case plan. The juvenile court changed the case plan from reunification to severance and adoption, and DCS filed a motion to terminate their rights in February 2017.

¶6 Testing positive for methamphetamine in March 2017, Jaime relinquished his parental rights to J.G. in May at the first day of the severance hearing, filing a motion to terminate his rights based on that relinquishment. The juvenile court granted the motion, finding Jaime "would not be able to care for his child for the foreseeable future." Jessica's parental rights were terminated in June 2017 after the completion of the severance hearing.

¶7 Born in August 2017, J.-G.'s meconium tested positive for opiates. DCS removed her from the parents' custody less than two weeks later and filed a dependency petition based on concerns about substance abuse and issues regarding mental health, neglect, and domestic violence that had not been addressed in the prior dependency involving J.G. Jessica had tested positive for opiates before and after J.-G. was born. The DCS case manager stated in the preliminary protective hearing report that Jaime had "failed to protect [J.-G.] and either is unaware of [Mother's] substance

abuse, or is aware [of it] and is not taking protective action to ensur[e the child's] safety." The juvenile court adjudicated J.-G. dependent as to both parents in November 2017 after they entered into agreements during a facilitated settlement conference, waiving the right to a hearing and admitting allegations of an amended dependency petition.

¶8 Following a permanency hearing in January 2018, DCS filed a motion to terminate the parents' rights to J.-G. After a two-day hearing in March and April, the juvenile court granted the motion in its May order, a twelve-page under-advisement ruling in which the court entered extensive factual findings, replete with citations to supportive documentation in the record. The court concluded that DCS had sustained its burden of proving the elements of § 8-533(B)(10) with clear and convincing evidence and had established by a preponderance of the evidence that termination of the parents' rights was in J.-G.'s best interests. This appeal followed.

Discussion

¶9 Under § 8-533(B)(10), a juvenile court may terminate a parent's rights if clear and convincing evidence establishes "the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause." The "same cause" refers to the "factual 'cause' that led to the termination" of the parent's rights "and not the statutory ground or grounds that supported" the termination. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 11 (App. 2004).

¶10 Jaime argues the evidence did not satisfy "the second prong" of this subsection. He asserts he "terminated his own parental rights to [J.G.], believing it to be in her best interests," arguing the circumstances were "fundamentally different than the current circumstances in which" the court terminated his parental rights to J.-G. Jaime contends that, in the dependency proceeding involving J.G., he admitted he had a substance abuse problem and that there had been an incident of domestic violence with Jessica that had resulted in law enforcement's involvement and the child's removal from the home. But here, he argues, he did not test positive for drugs and "committed no new acts of domestic violence." Relying on his own testimony, he asserts "his anger issues in 2016 went hand in hand with abusing drugs, and by remaining clean of drugs, his anger issues vanished as well." He further contends that, when J.-G. was born, he had been "clean for four months" and by the time of the severance hearing, "he had been clean for almost one full year." Jaime seems to be justifying his

inconsistency with regard to drug-testing and his failure to participate in counseling services by the fact that he was in jail for part of the time after he violated probation, he had sustained a back injury, which purportedly made it difficult for him to "get around in November," and he suffered "a financial setback" that left him without a phone or transportation that month.

¶11 We agree with DCS that Jaime is essentially pointing to evidence that was in his favor and asking this court to reweigh it, which we will not do. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004). Rather, as we previously stated, we review the record to determine whether it contains reasonable evidence supporting the findings of fact upon which the order is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4 (App. 2002). Here, the juvenile court's thorough findings are well-supported, and we therefore adopt them. *Id.* ¶ 16 (citing *State v. Whipple*, 177 Ariz. 272, 274 (App. 1993)). Although no purpose would be served by restating the court's ruling in its entirety, we note the following findings because they relate specifically to the portion of the statute Jaime insists was not established with sufficient evidence.

¶12 The juvenile court found, for example, that Jaime never addressed the issues of domestic violence and substance abuse during the dependency involving J.G. The court specified the ways in which he failed to do so. The court noted it had changed the case plan for J.G. from reunification to severance and adoption because of the parents' "willful refusal . . . to participate in services." Because those issues had remained unresolved, the parents were required, as part of the case plan for J.-G., to participate in services similar to those provided in the prior case: attend domestic violence and substance abuse classes, submit to substance abuse testing, address mental health issues, obtain a stable home and employment, and comply with their respective conditions or probation, which included drug testing and substance abuse classes as well as, for Jaime, domestic violence classes. The court found that although Jaime initially complied with the drug-testing requirement and had negative test results in September and six times in October, he missed about half the drug tests scheduled between September and December. And as the court noted, Jaime testified he knew a missed test would be regarded as a positive result.

¶13 Additionally, the juvenile court found Jaime had been taken into custody in December 2017 for violating probation by failing to provide verification that he was attending domestic violence classes and having contact with Jessica. The court stated that Jaime had failed to attend his

intake appointment for behavioral health classes in November 2017 and, although he testified at the hearing that he intended to enroll in April 2018, when he expected to be released from jail, the court found it was "unable to place any weight on that assertion," given Jaime's previous failure to follow through on similar services. The court found that the parents' "decision to defy their probation conditions, in particular the order to refrain from [having] any contact with each other, presented a complete barrier to reunification," adding, "[t]hey chose each other, not [J.-G.]"

¶14 Thus, notwithstanding evidence Jaime points to that showed he was, in some respects, more compliant with the case plan for J.-G. than the plan for J.G., there was ample evidence to prove the elements of § 8-533(B)(10). Specifically, the record supports the juvenile court's determination that the circumstances that culminated in Jaime's relinquishment of his rights to J.G. at the May 2017 severance hearing,[1] and its determination that he would not be able to "care for his child for the foreseeable future," were the same circumstances that had rendered him unable to discharge his duties as to J.-G. There was reasonable evidence in the record negating Jaime's assertion that he had "dealt with" the problems of his substance abuse and domestic violence.

¶15 We reject Jaime's assertion, as part of his challenge to the sufficiency of the evidence to support the elements of § 8-533(B)(10), that DCS failed to make reasonable efforts toward reunification. In addition to the fact that Jaime appears to be raising this for the first time on appeal and thereby waived the issue, *see Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, ¶ 18 (App. 2014), he does not specify what services DCS failed to offer him.[2]

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[1]Jaime testified at the severance hearing that he relinquished his rights to J.G. because he knew he would not prevail, given the evidence DCS was expected to introduce. He also acknowledged admitting the allegations of the dependency petition as to J.-G. because the circumstances of the case involving J.G. had not been resolved.

[2]At the permanency hearing as to J.-G. in January 2018, the juvenile court found the parents were not in compliance with the case-plan goal of reunification and had "substantially neglected or willfully refused to follow the case plan since the inception of the case." The court further found DCS had made reasonable efforts to "effectuate" the case-plan goal of reunification by offering services through Family Drug Court, substance abuse testing, substance abuse treatment, parenting classes, visitation, and Child and Family Team Meetings, and Jaime does not appear to have

¶16 Jaime argues in his reply brief that he did not waive this issue either by failing to raise it below or by failing to adequately develop it on appeal. But even were we to agree with him, the record shows the juvenile court and DCS assumed reunification services were required and that DCS attempted to provide them. The court-approved case plan included services similar to those required and provided in J.G.'s dependency because the same concerns persisted with respect to J.-G. As the court noted in its ruling, the parents were required to attend domestic violence classes, participate in substance abuse classes and testing, address mental health concerns, obtain a stable home and employment, and comply with conditions of probation. The court found and the record shows the case manager coordinated services and case-plan requirements with the probation officer, given that the requirements overlapped. Thus, through either probation or DCS, services were available to Jaime, including visitation with J.-G., from August 2017, when the case was first assigned to the case manager, until Jaime's arrest in early December.

¶17 The case manager testified Jaime was expected to enroll in services with CODAC for substance abuse services but did not attend his appointment on November 7, 2017. As part of probation and the case plan, he was required to submit to regular drug testing, but missed a significant number of tests, and to take fifty-two domestic violence classes, but he stopped attending after three classes. To the extent Jaime's incarceration in December made it more difficult to provide him with services, the fault lies with Jaime, not DCS. *Cf. Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 17 (App. 2007) ("[I]ncarceration will as a practical matter typically preclude all but minimal visits."). He chose to violate probation by living with Jessica, the victim of the domestic violence offense that had resulted in his initial arrest and conviction, and whose continued substance abuse had harmed both of their children, necessitating their removal from the home.

¶18 Jaime next challenges the juvenile court's finding that termination of his rights to J.-G. was in her best interests. He argues the court erred as a matter of law by basing that finding on J.-G.'s adoptability and his failure to visit J.-G. for over four months. He blames his back injury

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challenged this latter finding at that time. And at the end of the severance hearing for J.-G., the only argument Jaime made with respect to services provided related to whether termination under § 8-533(B)(10) requires a parent to participate in services. He did not argue the services provided were insufficient.

for his inability to visit, stating it resulted in a financial setback and left him without a phone or reliable transportation. Related to the best-interests issue, Jaime argues in the supplemental brief this court permitted him to file in light of our supreme court's decision in *Alma S.*, that Arizona's scheme of termination of parental rights is unconstitutional.

¶19 In *Alma S.*, our supreme court addressed the proper inquiry for the best-interests finding, holding that "courts must consider the totality of the circumstances existing at the time of the severance determination, including the child's adoptability and the parent's rehabilitation." 245 Ariz. 146, ¶ 1. Reaffirming its decision in *Demetrius L.*, the court stated that in conducting a two-step inquiry in a contested severance, the juvenile court must first determine parental unfitness, which is inherent in all but three of the eleven grounds for severance under § 8-533(B).[3] *Alma S.*, 245 Ariz. 146, ¶¶ 8-11 (citing *Kent K.*, 210 Ariz. 279, ¶ 9). Observing that a contested severance would be "constitutionally infirm" if unfitness were not inherent in the statutory ground relied upon, the court "explicitly reiterate[d]" its implicit conclusion in *Kent K.* "equat[ing]" those eight "substantive grounds for termination listed in § 8-533(B) with parental unfitness." *Id.* ¶ 9. The court further determined that this conclusion "ensures compliance with the due process requirement that a court find, by clear and convincing evidence, parental unfitness when a severance is contested." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982)). The juvenile court must then make the best-interests determination, which is focused on the child's interests, not the parent's. *Id.* ¶ 12. A court should consider a parent's participation in services and rehabilitation during this phase of the inquiry but may not "subordinate the interests of the child to those of the parent once a determination of unfitness has been made" and must recognize the parents' interests have diverged from those of the child. *Id.* ¶ 15.

¶20 Relying to a large degree on Justice Bolick's special concurrence in *Alma S.*, Jaime argues that by equating the substantive grounds for termination with parental unfitness and shifting the focus away from the parent in conjunction with the best-interests inquiry, the

[3] The three "facially procedural" exceptions identified by the supreme court are voluntary relinquishment, § 8-533(B)(7), failure to register as a putative father, § 8-533(B)(6), and failure to file a paternity proceeding after notice of a prospective adoption, § 8-533(B)(5). *Id.* ¶ 11. "These grounds address situations in which a parent has voluntarily relinquished . . . parental rights or waived the right to contest severance, and hence a finding of parental unfitness is not required." *Id.*

statute violates a parent's due process rights, characterizing the severance process as "no longer fundamentally fair." Jaime seems to be arguing that, in light of the majority's opinion in *Alma S.*, "Arizona's scheme for termination of parental rights violate[s] due process because," by considering rehabilitation solely as part of the best-interests finding, the burden of proving the grounds for severance is "unconstitutionally lessen[ed]." He notes that some of the substantive grounds for termination—such as the ground of neglect or abuse considered in *Alma S.*, *see* § 8-533(B)(2)—do not require the court to consider the services provided or the parent's rehabilitation.

¶21 Jaime did not raise a constitutional challenge to the statute below or in his opening brief on appeal. Failure to raise a claim in the juvenile court generally waives that claim on appeal. *See Christy C.*, 214 Ariz. 445, ¶ 21. The waiver principle applies to challenges to the statute's constitutionality. *See K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268 (App. 1997). Citing our supreme court's decision in *Brenda D. v. Department of Child Safety*, 243 Ariz. 437, ¶¶ 37-38 (2018), DCS asserts that Jaime waived the claim by raising it for the first time in his supplemental brief, forfeiting the right to relief for all but fundamental, prejudicial error. DCS further contends no such error occurred here in any event because *Alma S.* did not significantly change the law regarding the best-interests inquiry. In our discretion we may overlook the failure to raise such a claim below. *See Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6 (App. 2008).

¶22 We agree with DCS that Jaime waived this claim and that, in any event, he cannot show fundamental, prejudicial error here. Indeed, the majority in *Alma S.* acknowledged that Justice Bolick questioned the constitutionality of the "parental rights statutory scheme," but found the issue was not before the court because the mother had not raised it, declining to address it. *Id.* ¶ 22. Moreover, we agree with DCS that it is unclear whether Jaime is challenging the facial constitutionality of the statute, albeit as interpreted by the supreme court in *Alma S.*, or its constitutionality as applied in this case.

¶23 To establish a statute is facially unconstitutional, a "party must demonstrate no circumstances exist under which the challenged statute would be found valid." *Id.* ¶ 8. Jaime has made no such showing.

¶24 In addition, to the extent Jaime is claiming the statute is unconstitutional as applied to him, that argument fails as well. The ground at issue here, prior termination of a child for the same cause under

§ 8-533(B)(10), does require the juvenile court to consider a parent's rehabilitation because it expressly requires a showing that the parent "is currently unable to discharge parental responsibilities" due to the same cause that warranted a previous severance. And, DCS must provide the parent with reunification services before the parent's rights may be terminated pursuant to § 8-533(B)(10). *See Mary Lou C.*, 207 Ariz. 43, ¶¶ 14-15. The court made that requisite finding here. Thus, the constitutional infirmities Jaime complains of, specifically the lowering of the burden of proof on the essential element of unfitness required for severance, are not implicated here.[4]

¶25 As previously stated, Jaime never complained about the services DCS had provided and has therefore waived any issue regarding the reasonableness of the services. Moreover, the record supports the juvenile court's findings as to both the propriety of the services and Jaime's persistent inability to care for his child. The court was well aware of the evidence that Jaime had been more compliant with the case plan involving J.-G. than J.G. But the court was also aware at the time of the severance hearing in March 2018, that Jaime remained incarcerated. Additionally, the DCS case specialist testified seven-month-old J.-G. had been placed with her siblings, was "flourishing," and would benefit from termination by the permanency of a safe, stable home, and ongoing services and other benefits that would be available to her along with adoption.[5] Again, we will not

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[4]The mother's rights in *Alma S.*, in contrast, were terminated based on abuse and neglect under § 8-533(B)(2), which does not require a showing of a current inability to parent or place a parent's rehabilitation at issue. 245 Ariz. 146, ¶ 4. Thus, the juvenile court's consideration of the mother's rehabilitation in that case was in the context of the best-interests inquiry, under the preponderance-of-evidence burden of proof. *Id*. ¶¶ 8, 15. Moreover, despite his concerns about the constitutionality of the statute, Justice Bolick concurred in the result in *Alma S.* not only because the mother had failed to raise a constitutional challenge, but because the juvenile court had considered DCS's rehabilitation efforts and had determined the children remained at risk if reunited with the mother, findings that a reviewing court would not disturb absent an abuse of discretion. *Id.* ¶ 38 (Bolick, J., concurring).

[5]During closing argument, Jaime urged the juvenile court to give him a chance to be released from jail and parent his child, but conceded J.-G. was "in a great placement with siblings where she's going to be taken care of fantastically."

reweigh the evidence and we adopt the court's findings because the record contains reasonable evidence to support them. *See Oscar O.*, 209 Ariz. 332, ¶ 4.

¶26 Finally, we reject Jaime's constitutional challenges because our supreme court has stated that the statute, as previously construed in *Kent K.*, strikes a constitutional balance between the due process rights of a parent and the interests of a child. 245 Ariz. 146, ¶¶ 9-10. We are required to follow the decisions of our supreme court. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378 (App. 1993) (court of appeals has no authority to overrule, modify or disregard supreme court). And in doing so, we are bound by the court's conclusions in *Alma S.*, both express and implied.

Disposition

¶27 The juvenile court's order terminating Jaime's parental rights to J.-G. is affirmed.